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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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IN THE MATTER OF:	)))	
BROADCAST LOCALISM	))	**MB DOCKET NO. 04-233**

TO: OFFICE OF THE SECRETARY

<u>COMMENTS OF THE TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.</u>

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Increased regulation of the broadcast industry is not needed to promote the interests of local communities and groups. Current Commission regulations, as well as prevailing market conditions, more than adequately protect these interests and ensure that broadcasters provide programming that meets the informational needs and interests of the general public, significant segments of it, and local communities. Additional regulation of broadcasters in the name of promoting the public interest would increase and divert the amount of financial and other resources that broadcasters would have to devote to ensure compliance, versus developing and presenting new and innovative programming. Also, such regulation would require the Commission to become further entrenched in the dangerous business of state-mandated content regulation of speech.

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The Trinity Christian Center of Santa Ana, Inc., d/b/a, Trinity Broadcasting Network ("Trinity"), pursuant to Commission Rules 1.430 and 1.415, 47 C.F.R. §§ 1.430 and 1.415 (2003), hereby submits these comments in response to the Commission's July 1, 2004 *Notice of Inquiry on Broadcast Localism*, FCC 04-129. Trinity is a multiple station licensee of television facilities throughout the country, and has over thirty years of broadcast experience.

I. Introduction

Increased regulation of the broadcast industry is not needed to promote the interests of local communities and groups. Current Commission regulations, as well as prevailing market conditions, more than adequately protect these interests and ensure that broadcasters provide programming that meets the informational needs and interests of the general public, significant segments of it, and local communities. Additional regulation of broadcasters in the name of promoting the public interest would increase and divert the amount of financial and other resources that broadcasters would have to devote to ensure compliance, versus developing and presenting new and innovative programming. Also, such regulation would require the

Commission to become further entrenched in the dangerous business of state-mandated content regulation of speech.

II. Existing Regulations Adequately Protect the Public Interest

Additional regulation of the broadcast industry is not necessary because existing law adequately protects the public interest by requiring broadcasters to take community needs into account. Broadcasters are required to serve the public interest, and the Commission has set in place regulations to ensure broadcasters follow through with this obligation. Some of the most notable of these regulations in the television context are those pertaining to children's programming,[1] the quarterly preparation and placement in the public inspection file of issue ascertainment and programmatic responses,[2] equal access to candidates for public office,[3] and the banning of obscene programming.[4] Furthermore, in the current system, the public interest is protected by the public itself. Any member of the public may bring complaints to their local broadcaster, or even report the broadcaster to the FCC.[5] There is no reason to add additional regulations because the current provisions have adequately protected the public interest.

Adding superfluous regulations may actually hurt the public interest by diverting resources from more beneficial uses. The end result of additional regulations would likely not be an increase to the overall resources devoted to the public interest, but rather a rearranging of resources from the broadcaster's current public interest projects to the paper work and projects mandated by Commission regulation. This decrease in the broadcaster's efficiency, due to unnecessary paper work and projects required by the Commission, may actual cause a net

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[1] 47 C.F.R. § 73.4050 (2003).

[2] 47 C.F.R. § 73.3526(e)(11).

[3] 47 C.F.R. § 73.1941 (2003).

[4] 47 C.F.R. § 73.4170 (2003). *See also* http://www.fcc.gov/mb/audio/bickel/amfmrule.html (Listing all radio and broadcasting regulations).

[5] 47 C.F.R. § 73.3587 (2003). *See also* http://www.fcc.gov/cgb/complaints.html#general (Providing consumers with information on how to lodge a complaint).

decrease to the broadcaster's involvement in public interest projects. In addition to the foreseeable decrease in efficiency, history has taught us that there may be unforeseen additional damage to the public interest caused by well-meaning but unnecessary regulations.[6]

Moreover, television broadcasters particularly are already laboring under the government's new investment mandate to buildout and operate digital facilities. Digital television has a minimal reach and little free-to-the-house reception at present. This additional cost, in the millions of dollars for every television station, remains at risk. It would simply be counter-intuitive and burdensome to now increase the cost of operating further with additional re-regulation.[7]

Broadcasters cannot be all things to all people, and therefore the public interest obligations of broadcasters should be restricted to the real needs of the community. One broadcaster cannot adequately serve all the public interests in its service community. The diverse interests represented by differing segments of society and the conflicts arising between these interests would render such an undertaking impossible. Furthermore, pressing broadcasters to go beyond the real need of their communities would give special interest groups a forum to press their agenda on the public at large. This would cause further damage to the public interest by allowing special interest groups to push for regulatory measures that would address their own perceived or manufactured needs and not the real needs of the community. This would amount to

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[6] *See, e.g.*, Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment,* 97 Colum. L. Rev. 905 (1997); Hazlett and Sosa, *Was the Fairness Doctrine a "Chilling Effect"?,* 26 J. Legal Stud. 279 (1997) (Arguing the Fairness Doctrine had a negative affect on broadcasters meeting the public interest because it encouraged radio to avoid controversial topics).

[7] In the digital world, it may one day be cost effective for the broadcast industry, and fully serve the public interest, to require television stations to set aside one compressed digital channel for public, educational, and governmental use, similar to the current set asides cable systems and satellite services must now meet. Of course, if that day comes, it would need to be offset with the complete deregulation of all of a station's other digital channels.

broadcaster's subsidizing special interests, and diverting much needed support away from the real needs of the community the broadcaster currently serves.

The Commission is not in a position to adequately ascertain how each community would best be served. The real needs of a community vary greatly depending upon the geographic location and demographic make up of the community. Even if the Commission could fashion regulations that would give the broadcaster some latitude in how to best serve their community of license, the very nature of regulations would be a hindrance to this goal. The lack of flexibility and time-lag factors in modifying regulations cannot adequately address the fast-paced and ever changing needs of a community. Broadcasters are in a much better position to determine the needs and interests of their service community and address those determined needs and interests swiftly in meaningful ways; which broadcasters have faithfully been doing.

According to a survey by the National Association of Broadcasters, broadcasters contributed $9.6 billion in community service in 2003.[8] That is up $2.75 billion from $6.85 billion in 1997.[9] The report also outlined thirteen major areas of community interest in which local broadcasters all over the country had been involved, ranging from education and the environment to drug abuse and animal welfare.[10] Also listed in the report were fourteen national charity organizations that were supported by local broadcasters, including the American Red Cross, the United Way, and the American Cancer Society.[11]

Using fourteen different public interest issues, the report analyzed what percentage of broadcasters were addressing these issues through Public Service Announcements (PSAs),

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[8] Nat'l Ass'n of Broadcasters, *A National Report on Local Broadcasters' Community Service* (June 2004), *available at* http://www. broadcastpublicservice.org/Reports/2004Report.pdf [hereinafter NAB Report (June 2004)].
[9] *Compare* NAB Report (June 2004), *with* Nat'l Ass'n of Broadcasters, *A National Report on the Broadcast Industry's Community Service* (April 1998), *available at* http://www.ntia.doc.gov/pubintadvcom/aprmtg/NAB.pdf
[10] NAB Report (June 2004) at 1.
[11] *Id.* at 6.

Public Affairs Programming, or News segments.[12] The report showed that over 85 percent of television and radio broadcasters had public service announcements dealing with "Anti-violence," "Breast cancer/women's health," and "Drug use/abuse."[13] The report also found that 50 percent of television and over 65 percent radio broadcaster's aired public affairs programs dealing with "Children's issues" and "Fundraising drives."[14] Furthermore over 70 percent of radio and television broadcasters aired news segments dealing with "Anti-crime" and "Drunk driving."[15] The conclusion of the report was 65 percent of radio stations and 56 percent of televisions stations PSAs were "about local issues," and 60 percent of radio stations and 43 percent of television stations "aired local public affairs programs of at least 30 minutes in length every week."[16] Though the National Association of Broadcasters has kept the most comprehensive data on the public service contributions of broadcasters, another study done by Belo Corp., a major media owner in three geographic areas (Texas, Southwest, and Northwest), found that "the major network affiliates in [the] markets [studied] dedicated approximately one-third or more of their total broadcast hours to non-entertainment programming".[17] In Trinity's case, that number is well over eighty-percent of its overall programming, with a concentration on religious, inspirational and family oriented programming.

In addition to airing programs and announcements on a wide range of subject matter addressing the general needs of the community, broadcasters have consistently answered the call

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[12] *Id.* at 5.
[13] Anti-violence PSAs—television 87 percent and radio 86 percent. Breast cancer/women's health PSAs—television 87 percent and radio 86 percent. Drug use/abuse PSAs—television 88 percent and radio 86 percent. *Id.*
[14] Children's issues public affairs programming—television 50 percent and radio 68 percent. Fundraising drives public affairs programming—television 54 percent and radio 74 percent. *Id.*
[15] Anti-crime news segments—television 77 percent and radio 74 percent. Drunk driving news segments—television 74 percent and radio 73 percent. *Id.*
[16] NAB Report (June 2004) at 6.
[17] Comments of Belo, In re Public Interest Obligations of TV Broad. Licensees MM Docket No. 99-360, at 8 (Mar. 27, 2000) *available at* http://ftp.fcc.gov/cgb /dro/comments/99360/5006314185.pdf.

to respond to the public interest in times of need. On September 11, 2001, the broadcast community showed that it truly does serve the public interest. Television stations devoted "round-the-clock commercial-free coverage" which cost them between "$50 million to $75 million a day."[18] Such tragic and trying events prove that broadcasters do serve the public interest even when doing so results in economic loss. But it is not just in times of such dire need that broadcasters have stepped up to serve the public interest.[19] There are countless examples of broadcasters working with community organizations, and sponsoring events in their community to meet the needs of the community.[20]

Broadcasters have consistently worked to serve the public interest, in both times of crisis and on a day-in-day-out basis. There is no evidence that the current regulatory system has not adequately protected the public interest, or that increasing regulatory control would better protect the public interest. Without any solid evidence of appreciable betterment of the public interest, there is no reason to add new regulation given the potential for serious harm to the current system which has worked effectively.

III. Market Incentives Achieve The Commission's Regulatory Objectives

When the Commission allowed a deregulation of the telecommunications industry in 1984, it cited the "importance and viability of market incentives as a means of achieving our regulatory objectives" as a primary reason for doing so.[21] The market forces that provided the

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[18] McCleen, S., "The high cost of coverage" *Broadcasting & Cable* 8 (Sept. 17, 2001).

[19] *See e.g.,* NAB Report at 47-51 (June 2004) (Examples of broadcasters reacting to crisis by offering disaster awareness and relief).

[20] *See, e.g.,* NAB Report (June 2004); Pa. State Univ., *Partners in Public Service: Models for Collaboration* (2002), *available at* http://www.benton.org/publibrary/partners/pips.pdf.

[21] Fed. Communications Comm'n, *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 49 FR 33588, FCC 84-293 (August 23, 1984), at 3 (dealing with 47 C.F.R. Parts 0 and 73) [hereinafter 1984 FCC Order].

impetus for broadcast deregulation during the 1980's are much stronger today, and counsel against the imposition of new regulations upon broadcasters.

The first reason the Commission gave in 1984 for eliminating processing guidelines for broadcasters was that "licensees will continue to supply informational, local and non-entertainment programming in response to existing as well as future marketplace incentives, thus obviating the need for the existing guidelines."[22] In making its decision to deregulate, the Commission relied upon several studies which showed that market forces affecting broadcasters adequately protected the public interest.[23] The Commission concluded that "there has been a stable market demand over time for both news and public affairs programming and that commercial television stations have consistently met that demand."[24] The Commission reached a similar conclusion with respect to the effect of market forces on the need for programmers to determine the needs of the communities in which they operate. The Commission stated that "present market forces provide adequate incentives for licensees to remain familiar with their communities," and added that, "future market forces, resulting from increased competition, will continue to require licensees to be aware of the needs of their communities."[25]

One thing made clear by the Commission's 1984 order is that "[b]roadcasters do not operate in a vacuum."[26] Rather than viewing an individual broadcast station in isolation, a

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[22] *Id.* at 8. The FCC explicitly concluded "that existing marketplace forces, not our guidelines, are the primary determinants of the levels of informational, local and overall non-entertainment programming provided on commercial television." *Id.* at 19; *see also id.* ("We are confident, therefore, that under current marketplace conditions [informational, local, and non-entertainment] programming will continue to be available irrespective of our elimination of the guidelines."); *id.* at 18 ("[T]elevision stations' program performance is dictated by market incentives and is essentially independent of our processing guidelines.").
[23] *Id.* at 10. For example, during the mid to late 1970s, commercial television broadcasters provided more than twice the amount of informational, local, and non-entertainment programming that was required by FCC guidelines. *Id.*
[24] *Id.* at 12. The FCC also noted that there had been a "significant increase in the absolute supply of programming in the relevant categories resulting from the substantial growth in the number of television stations over time." *Id.* at 15.
[25] *Id.* at 49; *see also id.* at 54 ("[I]t is in the economic best interest of the licensee to stay informed about the needs and interests of its community.").
[26] *Id.* at 54.

station should be viewed as one small part of the larger broadcasting and media scheme. For example, the 1984 order made it clear that the proper inquiry is whether all broadcast stations, taken together, are meeting the needs of the community; a broadcast station should not be required to provide every type of programming that would serve the public interest:

> [T]here may be individual stations that are not meeting the guidelines with respect to all of the programming categories. We do not believe that such an occurrence is inconsistent with the public interest since . . . on average, stations are performing well above the guidelines. It appears, therefore, that the failure of some stations to provide programming in some categories is being offset by the compensatory performance of other stations. In this respect, market demand is determining the appropriate mix of each licensee's programming. For example, a licensee may find it competitively appropriate to emphasize one type of programming within the guidelines rather than presenting programming in all categories. At the same time, other stations in the market may elect to present other types of programming. The net result . . . is that overall performance will exceed the guidelines even though individual stations are not presenting required amounts in all program categories.[27]

The market incentives present within the broadcast industry ensure that the public interest is met precisely because an individual station has the ability to develop a niche by filling a programming void left by other stations, and uniquely serving specific segments of the community. This is particularly relevant because the overall number of broadcast stations in existence has increased substantially over time.[28]

As the Commission has realized, the market forces that exert pressure upon the broadcast industry from *without* may be more important than the market forces that operate *within* the industry. Twenty years ago, the Commission stated that "the market demand for informational, local and non-entertainment programming will continue to be met as the video marketplace

[27] *Id.* at 22.

[28] While there were 1,163 commercial and noncommercial broadcast television stations in existence in March 1984, that number ballooned to 1,712 by June 2002. *Compare* 1984 FCC Order at Appx. C (stating that there were 878 commercial and 285 noncommercial stations in March 1984) *with* F.C.C., *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming: Ninth Annual Report*, 02-145, at 79 (Dec. 31, 2002) [hereinafter 2002 Competition Report], *available at* http://www.fcc.gov/competition/proceedings.html#reports.

evolves,"[29] and that the increased level of competition caused by the emergence of new technologies "can, in our view, only further ensure the presentation of sufficient amounts of such programming."[30] The proliferation of new communications technologies over the past twenty years has increased exponentially the need for broadcasters to determine and meet the informational needs of the communities in which they operate in order to remain viable. As media such as the Internet,[31] satellite radio,[32] satellite,[33] cable,[34] digital and high definition[35] television, digital video services,[36] video on demand,[37] VHS,[38] laser discs,[39] DVDs[40] and PVRs[41] have grown in popularity, broadcasters have developed an increasing reliance upon informational, local, and non-entertainment programming in order to compete for the attention of

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[29] 1984 FCC Order at 20.

[30] *Id.* at 21.

[31] 54 million Americans were subscribed to an Internet service in June 2002, and 51% of these had accessed streaming audio or video at least once. 2002 Competition Report at 89. "The Internet also has become a source for video rentals and sales." *Id.* at 93.

[32] At present, over 12 million people have access to satellite radio services. *See Company Info – Corporate Overview*, *at* http://www.sirius.com (Sirius satellite radio "is available to more than 10 million DISH Network satellite TV users and SIRIUS Satellite Radio subscribers"); http://www.xmradio.com/index.jsp (XM Radio has over 2 million subscribers).

[33] In June 2002, there were 18.2 million subscribers to direct broadcast satellite services such as DirecTV and the DISH Network. 2002 Competition Report at 53, 58.

[34] The FCC stated in 2002 that cable availability "is very high and has been rising gradually over time." *Id.* at 19. About two-thirds of all American homes that have at least one television have some cable service, with about half of cable subscribers utilizing a "premium" service. *Id.* at 19-21. "Cable operators have invested substantial sums of money over the past decade to upgrade channel capacity, both by expanding bandwidth, and by employing digital compression technologies." *Id.* at 22. There were 308 nationally delivered basic cable networks in June 2002. *Id.* at 25.

[35] "During the past year, the amount of digital and HDTV programming offered by cable operators has increased. Cable operators are now offering high definition digital programming, which is delivered to subscribers with digital receivers for display in digital format and resolution." *Id.* at 42.

[36] "Most major cable operators currently offer a selection of digitally-compressed video channels to analog subscribers on a 'digital tier.'" *Id.* at 36. There were 16.8 million digital video subscribers in June 2002, and that number is expected to almost triple by 2006. *Id.* at 37.

[37] "VOD services allow the subscriber to select at any time programming they wish to view from a large selection of titles and categories stored on a remote server." *Id.* at 39.

[38] In 2002, the FCC stated that "[a]pproximately 93 million U.S. households, or about 90% of all households, have at least one VCR, with nearly 46 million households owning at least two VCRs." *Id.* at 92.

[39] 2 million U.S. homes had laser disc players in 2002. *Id.* at 92.

[40] There were 13.7 million homes with DVD players at the end of 2001, and it is likely that the number will almost double by the end of 2004. *Id.* at 92. DVDs made up one third of the video rental and sales market by the end of 2002. *Id.* at 92.

[41] Over one million homes had personal video recorders (PVRs) in 2002, which allow viewers to pause, record and rewind live digital television programs. *Id.* at 94.

viewers and listeners. In 2002, the Commission stated that "[v]iewership, when measured in audience shares of cable networks, continues to grow, while viewership share of broadcast television stations continue to decline."[42] In an effort to remain competitive, many broadcast stations have begun to utilize digital television services and high definition television transmissions in recent years.[43] This competition has confirmed the Commission's predictions of twenty years ago that market forces affecting broadcasters would continue to adequately protect the public interest.

IV. Added Regulations Will Only Divert Resources Away From Innovation

Added regulation would divert broadcasters' resources from the development of new programming and innovative services to compliance with governmental regulation without providing any tangible benefit to the public.

Regulations designed to further the interest of broadcasting consumers would actually hinder that end by diverting resources from the task of creating and distributing quality programming to compliance with governmental regulation. Aptly mentioned in the NOI is the pragmatic testimony of Dave Davis, General Manger, WPVI-DT:

> Pardon me, but forget the government. We have to answer to our viewers. And we have to do that every day. When they have more than a hundred channels to choose from, and we want them to choose us, we think the best way to do that is to provide the best possible service.[44]

Before 1984, excessive broadcast regulations diverted top management attention from the task of running their enterprises and serving the public better to regulation compliance.

> The impact was ... in the consumption of top management time (estimated at 10 to 25 percent) and burdensome paperwork requirements, most specifically for

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[42] *Id.* at 24. However, the continued demand for local broadcast television stations is shown by the fact that satellite television operators have expanded their delivery of such stations into their local markets. *Id.* at 61.
[43] *Id.* at 82, 83.
[44] *In re Broadcast Localism*, notice of inquiry MB Docket No. 04-233.

> Equal Employment Opportunity (EEO) and program logs. Postcard renewal was not viewed as particularly effective because all the related record keeping still is required. Financial reporting often was questioned, with a number of station operators doubting that there is any reasonable basis on which to require reporting at all.[45]

This diversion of top management time comes at a point when competitive forces and an expanding marketplace are requiring responsive action by broadcast organizations.

If the regulations did, in fact, impact the profitability of local broadcast stations, the result could severely limit consumer choice by decreasing the number of broadcasters in the marketplace. Recent testimony before the Senate Committee on Commerce reported that the broadcast media is currently operating at extremely low profit margins.

> The broadcast TV network business is becoming less and less profitable. From 2000 to 2002, we believe that the "big four" (ABC, CBS, NBC, and Fox) networks generated only $2 billion in profits on approximately $39 billion in revenue, a 5% margin. Excluding the most profitable network, we believe that the margins would fall to 1%.[46]

Any further inhibitions on a broadcaster's ability to meet the market demands on the station may well result in the demise of that particular broadcaster.

Some commentators have said, "[w]ith respect to broadcast programming, the United States has witnessed not so much market failure that justifies regulatory intervention as it has suffered regulatory failure that should be cured by greater reliance on markets, competition, and technological innovation."[47] While assessing today's viewing options to consumers, Victor B.

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[45] RESEARCH PROGRAM IN TELECOMMUNICATIONS AND INFORMATION POLICY, COLUMBIA UNIVERSITY GRADUATE SCHOOL OF BUSINESS, THE ECONOMICS OF TRADITIONAL BROADCASTING (VHF/UHF): AN ANTHOLOGY 60, (Mark Nadel & Eli Noam eds., 1983) (Prepared as background materials for the research contributors and discussants at the Columbia University conference "Rivalry Among Video Transmission Media: Assessment and Implications").

[46] *Media Ownership: Hearing Before the Senate Comm. on Commerce*, 108th Cong. (2003) (testimony of Victor B. Miller IV, senior managing director & equity research analyst, broadcasting - Bear, Sterns & Co., Inc.) *available at* http://commerce.senate.gov/hearings/testimony.cfm?id=950&wit_id=2053.

[47] THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 277 (1994).

Miller commented that "the average home can view 150% more broadcast networks, 87% more local TV stations and has 725% more viewing options on a national level now than in 1980."[48]

The concerns about shifting resources to compliance are not novel. In the 1984 deregulation order, the FCC stated that the regulatory system was an "imposition of burdensome compliance costs" on programmers.[49] The data from this time period on the guidelines is particularly instructive on this point. The Commission noted that:

> the existing guidelines impose[d] administrative costs on licensees. Although data from the previous analysis demonstrate that the existing programming amounts are largely a reflection of market forces rather than our guidelines, the compliance costs associated with these guidelines, with respect to formalized ascertainment and program logging requirements are not market dictated. The record here indicates that these costs are significant. To the extent that these rules are not necessary to meet our regulatory objectives, we conclude that the costs incident to technical compliance and record keeping are inappropriate.[50]

It is useful to note that the Commission not only found the administrative regulations to be burdensome and inappropriate, but also found them to be misleading.

> Thus, the existing quantitative structure significantly misrepresents the nature of a broadcaster's underlying programming obligation by incorrectly suggesting that the broadcasting of specified quantities of programming is enough to fulfill their traditional programming responsibilities. By restating the programming obligation in uncontested renewal proceedings in terms of issue-responsive programming, we are providing broadcasters with a more appropriate description of their programming obligation.[51]

Thus, the Commission abandoned the practice of dictating programming content.

> We conclude that elimination of the programming guidelines will not affect existing programming considerations in either the competing new applicant or the comparative renewal contexts. The standards for evaluating competing new applicants are set out in the *1965 Policy Statement on Comparative Broadcast*

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[48] *Media Ownership: Hearing Before the Senate Comm. on Commerce*, 108th Cong. (2003) (testimony of Victor B. Miller IV, senior managing director & equity research analyst, broadcasting - Bear, Sterns & Co., Inc.) *available at* http://commerce.senate.gov/hearings/testimony.cfm?id=950&wit_id=2053.
[49] 1984 FCC Order at 8.
[50] *Id.* at 26.
[51] *Id.* at 29.

> *Hearings*. While programming may be a consideration in these proceedings, it is but one of several elements that may be of decisional significance.[52]

The Commission also directly addressed the inefficacy and waste of its *ascertainment* regulations.

> Ascertainment procedures were never intended to be an end in and of themselves. Rather, these procedures were intended as a means of ensuring that licensees actively discovered the problems, needs and issues facing their communities, thereby positively influencing the programming performance of stations by affecting the process of program decision-making. Yet, we have no evidence that these procedures have had such an effect. Indeed, under existing requirements there is no guarantee that once a concern is ascertained by formal or informal means, programming responsive to that concern will be presented. Moreover, we believe that licensees become and remain aware of the important issues and interests in their communities for reasons wholly independent of ascertainment requirements, and that our existing procedures are, therefore, neither necessary nor, in view of their significant costs, appropriate.[53]

As an example, the Commission cited that the "current figures for non-entertainment programming categories show percentages far beyond those sought under the guidelines."[54] Because of this, the FCC concluded "we believe that the need for our ascertainment regulation has declined and will continue to decline, and that the Commission should eliminate it."[55] This determination was "consistent with the purposes and intents of Congress to eliminate unnecessary government regulation."[56] The Commission based its decision upon data from its extensive investigation.

The data further revealed that ascertainment makes little sense from an economic perspective. "The costs of ascertainment are numerous. The Commission estimated that

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[52] *Id.* at 42. While the *1965 Policy Statement* is no longer followed, renewal expectancy remains anchored in a station's demonstrated program service, as primarily evaluated based on its quarterly problems/program reports, ascertainment, community reputation, FCC rule compliance record, and special community outreach and service efforts. *Fox Television Stations, Inc. (KTTV(TV) Renewal)*, 72 RR 2d 297, ¶7 (March 10, 1993).
[53] *Id.* at 48.
[54] *Id.* at 49.
[55] *Id.*
[56] *Id.* at 49, n. 77.

elimination of ascertainment requirements would result in annual savings of 66,956 work hours to the industry and 761.5 work hours to the Commission."[57] In the 1984 Order, the FCC noted that "[a] study conducted by Michael O. Wirth found the annual mean cost of ascertainment for the licensee to be $6,574. An informal survey conducted by NAB found the range of costs to be from $2,425 to $8.986."[58] Twenty years later, the costs in today's dollars can only be much greater.

In addition, the Commission noted that "[o]ther costs to the public, the licensee, and the Commission must be considered as well, such as the expense of litigation over the formalized requirements of ascertainment. The Commission had previously characterized its experience with ascertainment in the adversarial arena as "litigation over trivia."[59] The Commission recognized that "[e]ven without actual litigation, it is clear that substantial resources are expended to make certain that a formalistic challenge is avoided."[60] The Commission found that licensees had to consult counsel to "assure that formalities ha[d] been satisfied" and that a "major savings from the elimination of formal ascertainment would be a reduction in attorney's fees."[61]

The Commission summarized its findings related to ascertainment by saying:

> [W]e find that to the extent the licensee is compelled to follow specific procedures, resources are diverted and the opportunity for licensee discretion is foreclosed. The resources which the licensee is forced to expend to satisfy procedural requirements are lost from other potentially beneficial activities, such as program production in response to determined needs.[62]

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[57] *Id.* at 51.
[58] *Id.*
[59] *Id.* at 52.
[60] *Id.*
[61] *Id.* at 52, n87.
[62] *Id.* at 53.

The Commission then concluded that the ascertainment regulations, like the broadcast content regulations, were counterproductive to the ends of serving the public.

> We do not believe that the benefits of the ascertainment requirements justify the costs of this procedure. While ascertainment does provide the licensee with knowledge of the community, it is clearly not the exclusive means of acquiring this knowledge, and is certainly not the most efficient. Licensees, like other citizens, are exposed to newspapers, newsletters, town meetings and other community activities, all of which provide indications of those issues that are important to the community.[63]

Ascertainment regulations have already been proven to be costly in terms of both time and money. It makes little sense to add burdensome regulations for ascertainment when such regulations will actually divert resources from the intended result of the regulations, which is to better serve the public interest.

V. The Public Interest Would Be Adversely Affected If Each Broadcast Station Were Required to Provide Programming That Met the Needs of All Segments of the Community

The contribution that broadcasters make to the public interest should be judged by whether all the stations and media services in the market together effectively address the local community's needs. The public interest would be adversely affected if each individual broadcast station were required to provide programming that met the needs of all segments of the community.[64] Such a requirement would be unwise, and possibly unconstitutional, since it would force the government to closely monitor and regulate the actual content of broadcasts.

With broadcast and all other types of media, the onus is primarily on the individual consumer to sort through the various options to find material that is of interest. No matter how popular a particular broadcast TV or radio station may be among members of the general public,

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[63] *Id.* at 54.

[64] "[W]e have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community." *Re Horace P. Rowley*, 48 F.C.C.2d 341, 342 (1974) (quoting Fairness Report, 39 Fed. Reg. 26372, 26375 (1974)).

there will always be some individuals and groups in the community that do not find any of the station's programming appealing. A requirement that every station provide programming that appeals to all segments of the community would threaten the existence of most stations, especially those which are primarily designed to meet the needs of an identifiable segment of the public. The better approach is to leave existing regulation as is and let the market supply the needs of the community and its component parts.

This reasoning is supported by the recent Supreme Court case involving the Child Online Protection Act (COPA). COPA sought to protect minors by prohibiting commercial vendors from knowingly posting Internet material that is "harmful to minors" without attempting to prevent minors from accessing the material.[65] In *Ashcroft v. ACLU*, the Supreme Court upheld an injunction which stayed the enforcement of COPA because it likely violated the First Amendment.[66] The Court held that an injunction was appropriate because "there are a number of plausible, less restrictive alternatives to the statute," such as "blocking and filtering software."[67] Under the First Amendment, the availability of filters made COPA problematic because filters "impose selective restrictions on speech at the receiving end, not universal restrictions at the source."[68] The Court added that, "[b]y enacting programs to promote use of filtering software, Congress could give parents [the ability to monitor what their children see] without subjecting protected speech to severe penalties."[69]

The basic principle of *Ashcroft v. ACLU* is applicable to all forms of media, including broadcast, and counsels against the adoption of regulations which would require stations to air certain types of programs before their licenses will be renewed. When the government can

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[65] *Ashcroft v. ACLU*, 542 U.S. __ (2004) (Kennedy, J., opinion of the Court, at 2-4).
[66] *Id.* at 2.
[67] *Id.* at 8.
[68] *Id.* at 8-9.
[69] *Id.* at 11-12.

further an important state objective by either regulating the content of speech or leaving it to the individual to select among various speakers, the First Amendment dictates that the latter course be taken.[70] Rather than imposing burdensome regulations which would require broadcast stations to alter the content of their programming, the better course is to leave the individual consumer to simply switch channels to a station or media service that contains the content he or she prefers.[71] The consumer, like an Internet filter, would merely "impose selective restrictions on speech at the receiving end."[72] The current broadcast regulatory regime effectively serves the public interest by fostering diverse content without imposing state-mandated content restrictions upon each station. The public interest is much better served by the existing menu of unique broadcast stations than it would be if each station were forced to become all things to all people.

The danger of state regulation of the content of broadcast speech is compounded by the nebulous nature of the public interest standard. While the pursuit of the "public interest" in the abstract is an important policy goal, it is not a suitable standard by which to impose content-based restrictions upon broadcasters.[73] The Supreme Court recently noted that when a "licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content."[74] Likewise, "a scheme

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[70] When the FCC lessened its restrictions upon broadcasters in 1984, it stated that "we believe that our new regulatory approach is more consistent with underlying First Amendment values." 1984 FCC Order at 28. In discussing its regulation of commercial broadcast speech, the FCC stated "we are concerned about becoming involved in the regulation of program content and of the attendant potential chilling effect on commercial speech which the guideline might exert." *Id.* at 63.

[71] The FCC has already taken a similar, hands-off approach with regard to the excessive commercialization of some stations: "audiences are likely to avoid stations with excessive clutter, thus making those stations less attractive to advertisers." *Id.* at 65.

[72] *See Ashcroft*, 542 U.S. __ at 8-9. In fact, it is much easier for a broadcast consumer to choose among various options than it is for an Internet user to do so. *Reno v. ACLU*, 521 U.S. 844, 854 (1997) ("Unlike communications received by radio or television, the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.").

[73] The FCC itself has stated that "the public interest standard necessarily invites reference to First Amendment principles." 1984 FCC Order at 27. Some commentators have gone as far to say that "the public interest is whatever the people who enforce it want it to be." Krattenmaker, Thomas G. & Lucas A. Powe, Jr., REGULATING BROADCAST PROGRAMMING 144 (1994).

[74] *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002).

conditioning expression on a licensing body's prior approval of content 'presents peculiar dangers to constitutionally protected speech.'"[75] While courts have treated broadcast speech differently than other forms of expression for the purposes of the First Amendment,[76] there has never been a doubt that viewers and listeners have a First Amendment right to receive messages largely free from government censorship.[77] Congress has already acted to protect these rights by clearly stating that the Commission lacks any "power of censorship" over radio broadcasts.[78] The best way to serve the public interest is to keep decision-making concerning the content of broadcasts largely in the hands of the broadcasters themselves.

VI. Conclusion

The Commission should not increase its regulation of the broadcast industry in an attempt to promote the interests of local communities and groups. Existing regulations adequately protect these interests because, to a large extent, they allow market conditions to dictate the content of broadcast programming. The current regime of regulation and market incentives has been effective in ensuring that the broadcast industry provides programming that meets the needs of the public. Additional regulation of broadcasters would probably have the unintended effect of forcing broadcasters to divert financial and other resources from general station operations to ensuring compliance with the law. In addition, added regulation would give

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[75] *Id.* at 321 (quoting *Freedman v. Maryland*, 380 U.S. 51, 57 (1965)).
[76] "Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) (citation omitted).
[77] It is well established that "[t]he Constitution protects the right to receive information and ideas." *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)). "[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Id.*
[78] 47 U.S.C. § 326 ("Nothing in this [Communications] Act [of 1934] shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition . . . shall interfere with the right of free speech by means of radio communication.").

the government more influence over the actual content of broadcast speech, a development that would be unwise from a policy standpoint and possibly unconstitutional.

Respectfully Submitted,

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